IN THE MATTER OF: DATE ISSUED: JAN 29 1990

INDEPENDENT LAND DEVELOPMENT 90-TLC-8
EMPLOYER

ON BEHALF OF

MAGDY BOCHRA
ALIEN

DECISION AND ORDER

This proceeding was initiated by the above-named employer who requested administrative-judicial review of the determination of a certifying officer of the United States Department of Labor denying an application for a temporary labor certification which the employer submitted on behalf of the above-named alien. This review of the denial of temporary labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal file.(hereinafter AF).

The employer, Independent Land Development, applied for a temporary labor certification on behalf of alien Magdy Fahem Bochra on December 9, l989.(AF6-7). In item 8 of the application, the employer stated its business activity as "farming date palm offshoots". In item 13 of the application it described the job to be performed by the alien as "planting date palm offshoots." This involves physical activity of digging holes, which are dug sometimes few months before actual planting. The know-how of the proper irrigation and the planting procedure with the right amount of top soil and manure is very important to offshoot farming. This procedure is important to bare quality and quantity fruit to sell commercially. The major tool for planting is a shovel, no major machinery used." In item 18b of the application the employer stated that the alien will be employed from 3/90 to 3/91. However, the application was accompanied by newspaper advertisement indicating the job will last at least 36 month.

In his letter dated January 3, 1990 the certifying officer of the U.S. Department of Labor (Mr. Paul Nelson) denied the application stating, "we are in receipt of the H-2A application you submitted on behalf of Magdy Bochra. The period of employment is from March 1990 through March 1991. The advertisement submitted indicates the job will last at least 36 months. Since the requested certification period specified on the ETA form is for twelve months exactly and consists of a variety of duties, it appears the employment is.. permanent rather than temporary in nature. Permanent year-around employment is not certifiable on a temporary basis." (emphasis added). The certifying officer went on to state, "..seasonal work is considered temporary as is other temporary employment where the worker is employed for a limited time only or a piece of work is of short duration. Employment which is contemplated to continue indefinitely is not

generally considered temporary. The petitioned position is for year-around employment." Relying on 29 C.F.R. 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act, the certifying officer concluded that "the job as described on the form ETA 750, part A is not seasonal and does not appear to be temporary in nature or of short duration." The certifying officer noted that "the application was initially filed as a non-ag temporary application but was returned to you since both the state agency and this office determined, on the basis of the specified job duration and duties, that the position was permanent. After the application was returned, you and your partner had several discussions with Rebecca Marsh Day regarding whether the position is temporary or permanent. You and your partner expressed different opinions regarding the nature and duration of the position. Mrs. Day advised you that she considered the job to be permanent employment but it was your decision on how to file the application. You were advised that if, after reviewing the application the Department again found the position to be permanent the application would be returned to you as it could not be processed under the H-2A regulations ." (emphasis added). The certifying officer admitted that "we understand that there has been some confusion regarding the appropriate filing procedures. Both the state agency and this office will be happy to provide assistance to you."

After the certifying officer's letter, the employer in a letter dated January 7, 1990 requested an expedited administrative review of the denial. In the January 7, 1990 letter, the employer stated, " I was not given the opportunity to submit all the proper paperwork before the U.S. Department of Labor denied my request for Temporary Alien Certification. Mr. Paul Nelson's letter states that they understand that there has been some confusion regarding filing for Alien Certification and that their office would be happy to provide assistance, but in the contrary, I asked for assistance from their office and from the CEDD to help clarify facts and procedures on requesting for alien certification, and I only got the run around since June of 1989." The employer also stated, "...The H-2A application submitted states a period of employment from March 1990 to March 1991. This period of employment was suggested through the assistance received from Mrs. Day of the U.S. Department of Labor. She stated that for temporary alien certification the period should be no longer than one year. ..The employment is not for a variety of duties. If is for farming date palm offshoots, which is seasonal in nature and is only for a short duration. (emphasis added). The employer also stated ,"Mr. Nelson's letter states certain regulations under the Migrant and Seasonal Agricultural Worker Protection Act, but he never supplied me with copies of the regulations so I may understand fully what he is referring to."(emphasis added). In conclusion the employer made the following request before this tribunal: "I would like the opportunity to file for temporary alien certification with the U.S. Department of Labor. I need a written response as to exactly what is needed in my package for review. If there was anything missing in my initial package, it was due to poor assistance on the part of the CEDD and the U.S. Department of Labor."

DISCUSSION AND CONCLUSION

The employer filed an application for temporary labor certification on behalf of Mr. Magdy Bochra, an alien. In item 13 of the application (ETA750), the employer described the job to be performed by the alien as "planting date palm offshoots". In item 18b, the employer stated the alien will be employed one year from 3/90 to 3/91. However, the newspaper advertisement

attached with the application stated the job will last at least 36 months. Based on these representations from the employer, the certifying officer denied the application on the ground that the job to be performed by the alien is permanent, not temporary. In his January 7, 1990 letter employer states that he made the application for temporary labor certification at the suggestion of Mrs. Day of U.S. Department of Labor. However the certifying officer's letter of January 3 , 1990 states the employer was advised by Mrs. Day that the job to be performed by the alien is permanent in nature, not temporary.

The regulations at 20 C.F.R. 655.100(c)(2) state that employment of "a temporary or seasonal nature", for the purpose of H2-A program, is defined at 29 C.F.R. 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act. Specifically, 29 C.F.R. 500.20(s)(l) provides that "labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year.."(emphasis added). In this case, since the employer's application states the job to be performed by the alien would last one year and the newspaper advertisement states the job would last 36 months, I find the certifying officer committed no error in denying the application for temporary labor certification.

On January 26, 1990 I had no success in reaching the employer by phone. If the employer would like to have a telephone conference with Mrs. Day to establish a proper procedure for his application, I would be glad to arrange it . My phone number is 202-653-5052.

ORDER

The certifying officer's denial of labor certification is hereby affirmed.

VICTOR J. CHAO
ADMINISTRATIVE LAW JUDGE